

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN DARELLE WITCHER,

Defendant-Appellant.

UNPUBLISHED
February 16, 2006

No. 256562
Calhoun Circuit Court
LC No. 00-004624-FH

Before: Meter, P.J., and Whitbeck, C.J. and Schuette, J.

PER CURIAM.

Defendant appeals as of right his sentences of fifty to seventy-five years imposed on his convictions of assault with intent to commit murder, MCL 750.83. We affirm.

Defendant was convicted by a jury of three counts of assault with intent to commit murder, three counts of possession of a firearm during the commission of a felony, MCL 750.227b, and one count of felon in possession of a firearm, MCL 750.224f, as a result of an incident in which he and another person exchanged gunfire with police officers.

Assault with intent to commit murder is punishable by life or any term of years. MCL 750.83. The statutory sentencing guidelines recommended a minimum term range of eighteen years, nine months to thirty-nine years for defendant's convictions of that offense. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to life in prison on one conviction of assault with intent to commit murder, and to concurrent terms of fifty to seventy-five years in prison for the other two convictions of that offense.¹

In *People v Witcher*, unpublished opinion per curiam of the Court of Appeals, decided August 19, 2003 (Docket No. 236188), this Court affirmed defendant's convictions, but vacated his sentences of fifty to seventy-five years and remanded for resentencing on those convictions before a different judge. This Court concluded that although the trial court had substantial and

¹ Defendant was also sentenced to three years, eleven months to seven and one-half years in prison for felon in possession of a firearm, to be served concurrently with his sentence for the assault convictions, and to a consecutive two-year term for felony-firearm. Those sentences are not at issue in this appeal.

compelling reasons for exceeding the guidelines, resentencing was required because the trial court improperly considered parole eligibility when fashioning the sentences. *Id.*, slip op at 11.

On remand, the trial court sentenced defendant to fifty to seventy-five years for the convictions of assault with intent to commit murder.² The trial court opined that the guidelines did not sufficiently take into consideration defendant's history of violent behavior, the type of weapons used in the assault (semi-automatic handguns), the proximity of the officers to defendant and the other man (approximately twenty feet), the number of shots fired in a short period of time (in excess of fifty shots within thirty seconds), and the need to protect society from defendant. The trial court observed that because defendant would spend many years in prison, it was likely that he would be less of a danger to society when he was released.

To constitute a substantial and compelling reason for departure from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. The reason for the departure must be articulated by the trial court on the record. MCL 769.34(3). A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the particular departure at issue. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003).

In determining whether a sufficient basis exists to depart from the sentencing guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant's criminal history than would adherence to the guidelines range. Moreover, in departing from the guidelines range, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the offender. *Id.* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We review the determination of the existence of a factor for departing from the guidelines for clear error, the determination that a factor is objective and verifiable de novo, and the determination that objective and verifiable factors merited departure from the guidelines range for an abuse of discretion. *Babcock*, *supra* at 265. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic which was already considered in calculating the guidelines range if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock*, *supra* at 269.

We affirm defendant's sentences. The sentencing guidelines accounted for defendant's prior record, MCL 777.51 - MCL 777.56, but did not consider that defendant had a history of violent behavior that began when he was a juvenile and continued until he committed the instant offenses at the age of twenty-nine. The guidelines took into account the facts that defendant discharged a firearm toward human beings, causing them severe physical and psychological injury, MCL 777.31, but did not consider that defendant discharged a semi-automatic weapon at

² Defendant received credit for 1,046 days served on the previous sentences.

the officers from approximately twenty feet away. The trial court properly found that these objective and verifiable factors were given inadequate weight by the guidelines, MCL 769.34(3)(b), and did not abuse its discretion by concluding that the factors constituted substantial and compelling reasons for exceeding the guidelines. *Babcock, supra* at 257-261. Contrary to defendant's assertion, the trial court did not improperly consider parole eligibility when imposing the sentence. Rather, the trial court simply observed that because defendant would be considerably older when he was eligible for release,³ it was likely that he would be less of a danger to society at that time. The sentences imposed were proportionate to defendant's circumstances and those of the offenses, *Milbourn, supra* at 636, and were within the range of principled outcomes. *Babcock, supra* at 269.

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette

³ Defendant is serving a life sentence for one conviction of assault with intent to commit murder; therefore, it is possible that he will never be released from prison.